it has provided 314,000 resold lines to more than 65 competing carriers.[188] Bell Atlantic further states that it provides resale on a timely basis and that KPMG has verified that Bell Atlantic's ability to provide resold lines exceeds actual demand.[189] Bell Atlantic contends that, unlike past 271 applicants, CSAs are no longer an issue because Bell Atlantic does not preclude customers from reselling such arrangements and aggregating traffic to meet minimum volume requirements.[190] Bell Atlantic notes, however, that it will impose termination penalties on Bell Atlantic customers who switch to resellers.[191]

Bell Atlantic has not supported its claim that the termination penalties it may impose on customers switching to resellers are just and reasonable. In fact, Bell Atlantic has a record of imposing termination penalties that have been found to constitute unjust and unreasonable restrictions on resale and therefore in violation of the Act. Recently, the New York Commission found that early termination penalties in Bell Atlantic CSAs and prohibitions on reseller assumption of existing Bell Atlantic CSAs were indeed discriminatory and in violation of the prohibition on unreasonable resale restrictions contained in Sections 251(b)(1) and 251(c)(4) of the Act.[192] In a subsequent ruling, while not imposing monetary sanctions upon Bell Atlantic, the New York Commission

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188 *See id.*

189 *See id.*

190 *See id.* at 45.

191 *See id.* at 46.

192 *See Complaint and Request of CTC Communications, Inc. for Emergency Relief Against New York Telephone d/b/a bell Atlantic-New York for Violations of Sections 251(c)(4) and 252 of the Communications Act of 1934, as amended, section 91 of the N.Y. Pub. Serv. Law, and Resale Tariff PSC No. 915*, Case No 98-C-0426, Order Granting Petition, NYPSC, 1998 N.Y. PUC LEXIS 506 (Sept. 14, 1998).

concluded that Bell Atlantic had a prospective duty to avoid imposing unreasonable restrictions on resale through excessive contract termination penalties.[193]

Accordingly, absent justification of termination penalties in its customer contracts, Bell Atlantic has failed demonstrate that it has complied with its nondiscriminatory resale obligations in accordance with the provisions of Section 271 and 251 of the Act.[194] As the Commission noted in the *Local Competition First Report and Order,* any resale restrictions are presumptively unreasonable.[195] Further, the Commission has indicated in past section 271 reviews that it "would want to review such fees and request that BOCs provide information justifying the level of cancellation or transfer fees in future applications."[196] Bell Atlantic has failed to address, much less justify its termination penalties.[197] Evidence that Bell Atlantic has imposed excessive contract termination penalties in the past raises a red flag and highlights the need for the Commission to ensure that Bell Atlantic is in compliance with the requirement that it submit compelling information to justify such termination penalties in the context of this

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193 *See Complaint and Request of CTC Communications, Inc. for Emergency Relief Against New York Telephone d/b/a bell Atlantic-New York for Violations of Sections 251(c)(4) and 252 of the Communications Act of 1934, as amended, section 91 of the N.Y. Pub. Serv. Law, and Resale Tariff PSC No. 915*, Order Denying Motion to Compel and for Sanctions and Clarifying the Order Granting Petition, in Case No. 98-C-0426, NYPSC, 1999 N.Y. PUC LEXIS 3 (February 1, 1999).

194 *See* 47 U.S.C. §§ 271(c)(2)(B)(xiv) and 251(c)(4); *see also BellSouth Section 271 I Order* at ¶ 212.

195 *Local Competition First Report and Order*, ¶ 939.

196 *See BellSouth 271 I Order*, ¶ 222.

197 Bell Atlantic's only treatment of the issue is its contention that it will impose termination liability upon customers who switch to resellers in an amount that equals the difference between what the customer has actually paid under its contract on the amount due under the remaining term of the contract. *See* Application at App. A, Tab 1, ¶ 270.

271 application proceeding. Moreover, Bell Atlantic's past behavior militates in favor of the Commission making available "fresh look" opportunities in the event it grants Bell Atlantic's Application, as discussed further in Section X.E, *infra*.

VIII. ONCE THE PROBLEMS CITED HEREIN ARE REMEDIED THE NEW YORK LOCAL EXCHANGE MARKET MAY BE "FULLY AND IRREVERSIBLY OPENED" TO COMPETITION

The requirement that the local exchange market of a state that is the subject a Section 271 request be "fully and irreversibly open to competition" has developed in the course of the Commission and Department of Justice ("DOJ") proceedings reviewing these requests. As a threshold matter, Section 271(d)(2)(A) requires the Commission to consult with the U.S. Attorney General in the course of the Commission's own evaluation, and to give substantial but not outcome determinative weight to the DOJ evaluation.[198]

In determining whether an RBOC meets the irreversibly open to competition standard, DOJ takes into consideration whether all three entry paths contemplated by the 1996 Act (interconnection, UNEs and resale) are fully and irreversibly open to competition to serve both residential and business customers. DOJ examines: (1) the extent of actual competition; (2) whether significant barriers continue to impede the growth of competition; and (3) whether benchmarks to prevent backsliding have been established.[199]

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198 *See* 47 U.S.C. § 271(d)(2)(A).

199 *See BellSouth Louisiana II Order*, ¶ 16; *BellSouth Louisiana Order*, ¶ 18; *BellSouth South Carolina Order*, ¶ 36; *Ameritech Michigan Order*, ¶ 42.

Bell Atlantic's application does not demonstrate that full and irreversible competition exists in the New York local market. The number of residential lines being served by CLECs residential is meager. According to Bell Atlantic, only a quarter of a million residential customers are served by CLECs. Moreover, most of those customers are served by resellers, not facilities-based providers. [200] According to the Application, facilities-based CLECs are serving only 651,793 lines total.[201] Second, significant barriers continue to impede the growth of facilities based competition. As the above analysis of Bell Atlantic's collocation tariff demonstrates, CLECs face a number of obstacles when attempting to gain and effect collocation arrangements in BA-NY central offices. Third, effective protections against Bell Atlantic's backsliding into anticompetitive behavior do not yet exist in New York. Pursuant to its Performance Assurance Plans, Bell Atlantic has offered measures that could serve as benchmarks to help determine whether backsliding is occurring, however, Bell Atlantic's proposed penalties to deter backsliding are not yet adequate. The self-effecting remedies or penalties that follow poor performance are insignificant in comparison to the revenue that Bell Atlantic will realize by entering the long distance market. Further, these penalties, set out in the form of billing credits, do very little to remedy the monetary damages potentially incurred by CLECs by Bell Atlantic's anticompetitive behavior.

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200 *See* Application, at 75.

201 *See* Application, Att. A.

IX. ON THE EXISTING RECORD IT IS UNCLEAR WHETHER BELL ATLANTIC IS IN COMPLIANCE WITH THE REQUIREMENTS OF SECTION 272

Section 271(d)(3)(B) sets forth a separate determination that the Commission must make before it can approve an application for 271 relief: section 271(d)(3)(B) provides that the Commission shall not approve a BOC's application for 271 authority unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272,"[202] which requires a BOC to provide certain interLATA services through a separate affiliate, and establishes structural and nondiscrimination safeguards that are designed to prevent anti-competitive discrimination and cost shifting.[203] The rationale of Section 272 is to deter a BOC from discriminating in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. As a result, Congress required the FCC to find that a section 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of section 272. The Commission views this requirement as vitally important, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate.[204] Such safeguards further discourage, and facilitate detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.

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202 47 U.S.C. § 271(d)(3)(B).

203 *Ameritech Michigan Section 271 Order,* ¶ 344.

204 *See Ameritech Michigan Section 271 Order*, ¶ 347; *BellSouth Louisiana II Section 271 Order*, ¶ 323.

Section 271(d)(3)(B), which requires the Commission to make a finding that the BOC applicant will comply with section 272, in essence requires the Commission to make a predictive judgment regarding the future behavior of the BOC. In making this determination, the Commission should look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272. Moreover, section 271 gives the Commission the specific authority to enforce the requirements of section 272 after in-region interLATA authorization is granted.

Section 272(b)(5) of the Act provides that the BOC's section 272 affiliate shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection. To satisfy the requirement that transactions between a BOC and its section 272 affiliate be "reduced to writing and available for public inspection," the Non Accounting Safeguards Order requires the section 272 affiliate, "at a minimum, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transaction through the company's home page."[205] Moreover, the Commission determined that the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow the Commission to evaluate compliance with its accounting rules.

Bell Atlantic claims that it will comply with all of Section 272's nondiscrimination safeguard requirements, and in fact contends that the policies,

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205 *See Implementation of the Non Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21913-14 (1996).

procedures and training and controls to ensure compliance are already in place.[206] Specifically, Bell Atlantic submits that its 272 affiliates will be operated as independent carriers and will conduct business with the parent company on an arm's length basis, including not owing any transmission or switching facilities; maintaining separate books and records; having separate officers, directors and employees; a prohibition upon utilizing the parent in order to obtain financing; and reducing all transactions with the parent to writing and making them available for public inspection.[207] In order to enforce the nondiscrimination requirements, Bell Atlantic states that it has established internal control mechanisms to detect and deter any inappropriate behavior.[208]

Based on the existing record it cannot be determined whether Bell Atlantic is in compliance with its section 272 obligations. As indicated above, in determining whether a BOC meets the criteria of Section 272, the Commission looks to past and present behavior of the applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272. Bell Atlantic has a spotty record of performance of past promises to this Commission. For example, in its order approving the Bell Atlantic/NYNEX merger[209] the Commission ruled that in order to alleviate the anti-competitive effects of the merger, Bell Atlantic was to comply with a number of merger conditions. But two years later, as evidenced in comments filed by a number of carriers in response to the Commission's request for comment on Bell

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206 *See* Application, at 63.

207 *See id.* at 63-66.

208 *See id.* at 69.

209 *See Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporations*
(continued...)

Atlantic's February 5, 1999, merger compliance report, Bell Atlantic had either not been implemented at all, or implemented only partially, a number of merger conditions. Consequently, the Commission must, and ALTS members will, be diligent in monitoring Bell Atlantic's section 272 compliance.

X. BELL ATLANTIC'S APPLICATION FAILS TO DEMONSTRATE THAT ITS ENTRY INTO THE INTERLATA MARKET IN NEW YORK IS IN THE PUBLIC INTEREST

Section 271(d)(3) of the Act provides that the Commission may not approve a section 271 application unless, among other things, the requested authorization is consistent with the public interest, convenience, and necessity. In the *Ameritech Michigan Section 271 Order*, the Commission explicitly rejected the view that its responsibility to evaluate public interest concerns is limited narrowly to assessing whether a BOC entry would enhance competition in the long distance market.[210] Rather, the Commission stated that its public interest inquiry must be a broader one that includes an assessment of whether conditions are such that the local market *will remain open.*[211] Thus, the Commission could find that Bell Atlantic had satisfied each and every item on the fourteen point checklist and still not grant the Application.[212] Further, the

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(...continued)
and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd 19985 ("*Merger Order*").

210 *Ameritech-Michigan Section 271 Order*, ¶ 361.

211 *See id.*

212 As the Commission stated in the *Ameritech Michigan Section 271 Order*, ¶ 390: "Although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to entry to the local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrants after receiving in-region, interLATA authority."

Commission has recognized that "in the absence of adequate commitments from a BOC, we believe that we have the authority to impose such requirements as conditions on our grant of in-region, interLATA authority."[213] Indeed, the Commission's public interest analysis balances a number of factors in order to determine whether RBOC entry will serve the public interest, convenience and necessity, and this analysis is not merely a rehashing of the competitive checklist items, but rather all relevant factors, [214] including the following: (1) whether all pro-competitive entry strategies are available to new entrants, including a variety of arrangements (interconnection, UNEs and resale) available to different classes of customers (business and residential) in different geographic regions in different scales of operation;[215] (2) whether a BOC is making these entry methods and strategies available, through contract or otherwise, to any other requesting carrier upon the same rates, terms and conditions;[216] (3) whether the BOC has agreed to performance monitoring which permits benchmarking and self-executing enforcement mechanisms;[217] (4) whether the BOC has provided for optional payment plans for the payment of non-recurring charges that would ease the financial burden of market entry;[218] (5) the existence of state or local laws that affect market entry including, but not limited to, laws that affect rights-of-way;[219] and (6) the existence of

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213 *Ameritech Michigan Section 271 Order*, ¶ 400.

214 *See BellSouth Louisiana Section 271 Order*, ¶ 361.

215 *See Ameritech Michigan Section 271 Order*, ¶¶ 387, 391.

216 *See id.* ¶ 392.

217 *See id.* ¶¶ 393-94; *BellSouth Louisiana Section 271 Order*, ¶¶ 363-64.

218 *See Ameritech Michigan Section 271 Order*, ¶ 395.

219 *See id.* ¶ 396.

discriminatory or anti-competitive behavior or violation of any state or federal telecommunications law.[220]

As demonstrated above, the hallmark of the Commission's public interest analysis is whether all barriers to entry into the local telecommunications market have been met, and whether the market will *continue* to remain open once 271 authorization is granted. While Bell Atlantic's proposed performance assurance measures are useful as one tool to address discriminatory behavior by Bell Atlantic, the proposed plans do not provide sufficient incentives to deter Bell Atlantic from engaging in discrimination once 271 authority is received. Therefore, ALTS submits that the Commission should implement antibacksliding prevention measures and enforcement procedures, modeled after those proposed by Allegiance Telecom in its Petition for Expedited Rulemaking,[221] to address violations of 271 obligations in the event that Bell Atlantic's application is granted. Further, the Commission should make fresh look opportunities available in the event it grants Bell Atlantic's Application.

A. The Commission Must Look Behind Bell Atlantic's Claims That it Meets the Public Interest Standard

Bell Atlantic makes three general assertions in support of its public interest argument: (1) the local market in New York is open and thriving; (2) mechanisms are in place to ensure that the market remains open and thriving; and (3) Bell Atlantic's entry into the New York long distance market will enhance competition and consumer welfare

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220 *See id.* ¶ 397.

221 *In the Matter of the Development of a National Framework to Detect and Deter Backsliding to Ensure Continued Bell Operating Compliance with Section 271 of the Communications Act Once In-region InterLATA Relief Is Obtained,* RM 9474, (Feb. 1, 1999) ("Allegiance Petition").

in that market. In support of its statement regarding the openness of local markets, Bell Atlantic asserts that it is currently facilitating competitive entry into the local market by way of interconnection, access to UNEs, and resale.[222] Bell Atlantic notes that its competitors' sizeable investment, approximately $1 billion in local plant, demonstrates their confidence in their ability to compete effectively with Bell Atlantic in New York and that at 1998 year-end, New York had more facilities-based local competitors than any other state.[223] Bell Atlantic also describes, in support of its argument, the wide scope of local market entry strategies available in New York, including: wireline, cable, fixed and mobile wireless services; urban penetration in a number of cities; and service to business and residential customers.[224]

Furthermore, Bell Atlantic asserts that the local market will remain open by virtue of a number of pro-competitive constructs. First, Bell Atlantic believes that the New York Commission's aggressive regulatory regime will ensure that markets remain open.[225] Second, Bell Atlantic states that is subject to mandatory and voluntary performance reporting and assurance mechanisms that will help regulate anti-competitive behavior including: reporting requirements in the New York Commission's Carrier-to-Carrier proceeding (Case 97-C-00139); the New York Commission's OSS standards; Bell Atlantic's Performance Assurance Plan; and Bell Atlantic's Change Control Assurance Plan.[226] In the latter two mechanisms, Bell Atlantic pledges $269 million in self-

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222 *See* Application, at 72.

223 *See id.* at 73-74.

224 *See id.* at 74-76.

225 *See id.* at 79-86.

226 *See id.* at 86-91.

executing billing credits to be given to CLECs in the event Bell Atlantic fails to meet certain state-approved performance metrics.

Bell Atlantic also contends that additional, non-self-executing remedies for anti-competitive behaviors, including treble civil damages for violations of federal anti-trust law, are available, and notes that Bell Atlantic has a disincentive to exhibit anti-competitive behavior in New York, because such behavior would necessarily harm the efforts of Bell Atlantic's affiliates in other states. Finally, in support of Bell Atlantic's assertion that entry into the New York long distance market will enhance competition and consumer welfare in that market, Bell Atlantic claims that long distance competition is presently inadequate for low volume (residential) customers who would have immediate access to a new long distance provider (Bell Atlantic) if Bell Atlantic's application were approved.[227] Bell Atlantic cites the provision of long distance service by SNET as proof that the provision of long distance service by an ILEC will enhance consumer welfare.[228]

Bell Atlantic's entry into the in-region, interLATA market in New York, is not at this time in the public interest for several reasons. First, as discussed at length above, Bell Atlantic has not met all of the competitive checklist items, as required by Section 271(c)(2)(B) of the Act. Bell Atlantic's inability to provision unbundled loops and access to OSS would, by themselves, compels a finding that Bell Atlantic fails to meet the public interest standards of section 271.

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227 *See id.* at 92-96.

228 *See id.* at 96-98 (noting that the long distance rates of SNETs residential customer that use SNET as their long distance provider are 36% lower than AT&T's rates).

B. Bell Atlantic's Performance Assurance Plans Do Not Meet the Public Interest Test

The rationale behind the Commission's "self-executing remedy" requirement is to promote the swift development of local exchange competition by preventing competitors from being driven out of business by being forced to litigate operational issues with the BOC each time such issues arise. The record clearly demonstrates that the performance assurance plans proposed by Bell Atlantic, which rely upon billing credits to "compensate" competitors for failure to meet performance measurements, do not provide adequate penalties to deter Bell Atlantic from discriminating against CLECs. The record in the New York proceeding is clear on this point: the Performance Assurance Plan ("PAP") as proposed by Bell Atlantic is not capable of fulfilling its intended purpose.[229]

The Bell Atlantic PAP has two parts. The first part evaluates the resale, UNE, interconnection and collocation modes of market entry from a broad, market perspective. If Bell Atlantic fails to perform in any category or "mode of entry" it is subject to bill credits which collectively may reach $150 million. The second part of the PAP evaluates Bell Atlantic's performance pursuant to eleven specific "Critical Measures" identified by the New York Commission. If Bell Atlantic fails a particular Critical Measure, CLECs that received substandard performance with respect to that measure will receive billing credit. Collectively, the billing credits under the second part can reach a maximum level of $75 million annually.[230] The PAP, as proposed by Bell Atlantic, has several

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229 *See Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, in 97-C-0271,* Comments in the New York Commission's Notice of Proposed Rulemaking, Issued Aug. 30, 1999 (Oct. 4, 1999).

230 *See id.* at 88-89.

fundamental problems. First, he PAP would allow Bell Atlantic to hide discriminatory practices through a weighting and penalty scheme that is tied to statistics rather than the occurrence of discrimination.[231] That is, Bell Atlantic's plan relies on an approach that utilizes aggregate measurements of performance. Under the PAP, Bell Atlantic will be allowed to offset poor performance in one performance category with good performance in another category. Similarly, Bell Atlantic will be allowed to use good performance in a subsequent or prior month for a particular measure to offset poor performance in a given month. Such offsets do not accurately depict Bell Atlantic's true performance. Furthermore, the PAP's use of billing credits, instead of monetary penalties, provides little incentive for Bell Atlantic to avoid discriminatory behavior toward CLECs. As the Common Carrier Bureau indicated recently in a letter to SBC, "the potential liability under a [performance assurance type] plan must be high enough that an incumbent could not rationally conclude that making payments under an enforcement plan is an acceptable price to pay for hindering or blocking competition."[232]

The cap on Bell Atlantic's liability under the PAP will not deter them from discrimination. Even in those instances where discriminatory activity might lead to financial penalties, those penalties are far below the levels necessary to incent Bell Atlantic to provide nondiscriminatory service. When compared to the multi-billion dollar revenue flows that Bell Atlantic will realize from local and long distance revenue streams

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231 *See Comments of Intermedia Regarding Bell Atlantic's Performance Assurance and Change Control Assurance Plans*, Case 97-C-0271 et al., (filed July 23, 1999).

232 Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau to P. Hill-Ardoin, SBC (Sept. 28, 1999).

in New York once Section 271 relief is granted, the $269 million maximum annual penalty proposed by the Bell Atlantic plans is clearly insignificant.

C. The Commission Must Adopt Stringent Antibacksliding Measures

ALTS submits that prior to the grant of Bell Atlantic's Application, the Commission must adopt mechanisms to ensure that Bell Atlantic does not backslide on its obligations pursuant to section 271 of the Act. As Allegiance Telecom indicated in its *Petition for Expedited Rulemaking*,[233] a BOC's statutory obligation to provide each element of the competitive checklist continues even after a it has obtained in-region interLATA relief. However, as evidenced by the three year long process in New York, compliance with key procompetitive provisions of the Act has been slow in coming, and advances have largely resulted from pressure imposed by regulators and competitors. Therefore, ALTS submits that backsliding framework be in place prior to the grant of 271 authority to Bell Atlantic.

1. The Commission Has Clear Authority to Impose Antibacksliding Measures

The Commission undoubtedly has ample authority to impose safeguards to guard against backsliding. The Commission's authority is derived from several sources. First, Section 271(c)(6) empowers the Commission to enforce BOC compliance with the competitive checklist and any additional commitments made by the BOCs in exchange for interLATA relief. In addition, the Act provides the Commission with additional authority to establish backsliding prevention measures pursuant to its authority over the terms and conditions of interconnection, contained in section 251. Further, as the

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233 *See* Allegiance Petition.

Supreme Court affirmed, the Commission has independent rulemaking authority pursuant to sections 201(b), 303(r), and 4(i) of the Act to adopt rules and regulations to implement the Act.

The Commission's authority to implement backsliding prevention measures can be found in the Act itself. The Act specifically provides that once a BOC receives interLATA relief, the primary tool available to the Commission to ensure continued compliance with the requirements of section 271 is section 271(d)(6)(A). Section 271(d)(6)(A) provides that:

> If at any time after the approval of [a section 271 application], the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing
>
> (i) issue an order to such company to correct the deficiency;
> (ii) impose a penalty on such company pursuant to title V; or
> (iii) suspend or revoke such approval....
>
> The Commission shall establish procedures for the review of complaints of failures by Bell operating companies to meet conditions required for approval [of a section 271 application]. Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.[234]

The Commission has consistently recognized that, aside from its authority under section 271 of the Act, the Commission derives authority to enforce section 271 obligations from a number of statutory sources. For instance, the Commission recognized in the *Ameritech Michigan Section 271Order* that:

> the Commission independently derives authority for the imposition of conditions in the section 271 context from 303(r) of the Communications

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234 47 U.S.C. § 271(d)(6)(A).

> Act...Because section 271 is part of the Communications Act, the Commission's authority under section 303(r) to prescribe conditions plainly extends to section 271. Moreover, as noted we do not read section 271 as containing any prohibitions on conditions but rather, find express support for conditioning approval of section 271 applications in the language of section 271(d)(6)(A).[235]

In addition, the Commission has unambiguous statutory authority to implement antibacksliding mechanisms and develop performance standards to gauge continued BOC compliance with section 271 pursuant to its authority under sections 201, 251, 303(r) and 4(i). The Supreme Court has specifically held, in fact, that section 201(b) of the Act provides the Commission with independent authority to implement the local competition provisions of the Act.[236] Moreover, the Commission's broad authority to implement the interconnection provisions of the Act under sections 251(d) and 201(b) fully empowers the Commission to implement antibacksliding standards. What's more, sections 303(r) and 4(i) of the Act empower the Commission to adopt rules and regulations to implement the Act. ALTS submits, therefore, that there can be little doubt about the existence of the Commission's statutory authority to implement antibacksliding measures..

2. As Part of its Antibacksliding Framework the Commission Should Establish a Section 271 "Rocket Docket"

Section 271(d)(6)(B) directs the Commission to "establish complaint procedures for the review of complaints concerning failures by [BOCs]" to live up to section 271

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235 *Ameritech Michigan Section 271 Order*, ¶ 401.

236 *See AT&T Corp. v. Iowa Util. Bd.* ("We think the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996.").

obligations.[237] Additionally, the Act mandates that section 271 complaints must be resolved within 90 days.[238] ALTS submits, therefore, that the Commission should promulgate rules establishing complaint procedures along with antibacksliding measures, similar to those discussed in the Allegiance Petition.[239]

A federal complaint procedure would be useful in determining whether a BOC compliance issue results from an isolated incident that occurred in a particular state, or is a region-wide problem, which would require intervention by this Commission for resolution. Such a federal complaint process would not in any way limit the ability of state commissions to conduct independent enforcement procedures. In developing a complaint procedure the Commission should establish a forum akin to its "Rocket Docket" expedited complaint process.[240] The purpose of the Commission's Rocket Docket is to resolve interconnection and other local competition-related disputes expeditiously.[241] In the event the Commission approves Bell Atlantic's application, section 271 backsliding will become a primary focus of local competition-related disputes. As the Commission has previously recognized, competitors need access to dispute resolution mechanisms that are flexible and don not involve lengthy and drawn out litigation. Therefore, a Rocket-Docket-like forum should be made available to CLECs to air section 271-related complaints.

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237 47 U.S.C. § 271(d)(6)(B).

238 *Id.*

239 *See* Allegiance Petition.

240 *Implementation of the Telecommunications Act of 1996 – Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018 (1998).

241 *Id.*

As part of the 271 complaint process, CLECs also should have the ability to petition the Commission for a declaratory ruling establishing fault in cases of service outages and similar network problems. Many CLECs are implementing an entry strategy that relies upon UNEs provided by the BOCs to provide service. Therefore, a BOC's failure to provision service correctly, or to meet circuit cutover deadlines often is attributed by the customer to the CLEC rather than to the BOC.[242] Attribution to CLECs of fault for service outages can cripple a CLEC's reputation in a community in spite of the fact that the network outage may have been caused by the BOC. In the event the Commission makes a finding establishing that the fault for the problem lies with the ILEC, the incumbent would be required to send a letter, approved by the CLEC, to the CLEC's customer explaining the root cause of the problem and reporting the Commission's finding. A determination of fault by the Commission would go a long way toward protecting CLECs from acquiring a reputation that they do not deserve in cases where service outages are caused by other parties.

D. The Commission's Antibacksliding Framework Should Utilize a Three-Tiered Penalty Approach

ALTS agrees with the three tiered penalty approach suggested by the Allegiance Petition. Use of the three tiered penalty approach would pressure provide solid incentives to supplement the PAP, and which would result in BOCs compliance with 271 obligations and commitments. The three tiered penalty approach would work as follows.

In response to backsliding, the Commission would first mandate a reduction in rates that a BOC charges competitors for Checklist items, such as resale, UNEs, and

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[242] Much like hot cut loops, which are provisioned by the incumbent.

traffic termination. If price reductions fail to result in compliance within 60 days, the Commission would next suspend section 271 authority, which would preclude a BOC from marketing or accepting new orders for in-region interLATA service. Such a "freeze" of authority would not affect existing BOC long distance customers. Finally, if neither of the aforementioned remedies results in compliance within an additional 60 days, the Commission would levy material fines on BOCs on a per-occurrence basis. By gradually increasing pressure on BOCs to comply with section 271 over a period not exceeding 120 days from the Commission's original determination, ALTS believes that the impact of BOC noncompliance on consumers and on competition itself would be minimized.

1. Tier 1: Failure to Comply with Performance Measures Results in Price Reductions – a Federal Version of the New York Approach

ALTS submits that the Commission should adopt a federal version of the performance assurance plan adopted by the New York Commission. Under the New York approach, the New York Commission acts as a first line of authority for enforcing its state-specific performance metrics, while this Commission has ultimate authority regarding issues related to Bell Atlantic's ability to market in-region long distance service. The New York Commission proposal includes a series of "critical performance measures" that Bell Atlantic must report to the New York Commission, and failure to meet established performance benchmarks would result in reduced resale, local loop, and traffic termination rates until such time as Bell Atlantic improves its performance.[243]

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243 *Id.* at 39-41. ALTS notes that the Commission would not need to adopt each and every antibacksliding measure that the New York Commission has adopted, but that the majority of the price-reduction measures are appropriate.

ALTS strongly endorses the approach taken by the New York Commission, and suggests that this Commission adopt a corresponding version of the New York price-reduction approach as the first tier in the three-tiered national antibacksliding framework. ALTS recommends expanding on the New York approach to have rate reductions spread across all Checklist items, including resale, UNEs, and traffic termination. Consistent with this "Federal-State" approach, New York could supplement its own antibacksliding policies.

2. Tier 2: Suspend 271 Authority for Continued Noncompliance

Under section 271(d)(6)(A), if after notice and hearing "the Commission determines that a Bell operating company has ceased to meet any of the conditions required for [271] approval," the Commission has the authority to: (i) order a BOC to correct deficiencies in its 271 compliance; (ii) impose monetary penalties for falling out of compliance with 271; or (iii) suspend or revoke a BOC's 271 authority.[244] Clearly, the Commission's authority to suspend 271 authority would likely be an effective means of promoting continued BOC compliance with section 271 obligations and commitments.

Given these options, if Tier 1 rate reductions failed to result in BOC compliance within 60 days, ALTS submits that the Commission should automatically suspend a BOC's ability to market or accept new orders for in-region long distance service. This type of suspension would in no way disrupt service to existing customers. Rather, suspension would prevent a BOC from marketing or accepting new orders for in-region long distance service. If rate reductions fail to result in compliance, ALTS believes that this self-executing suspension remedy would cause most BOCs to take whatever

244 47 U.S.C. § 271(d)(6).

corrective measures are necessary to comply with the Commission 271 framework of performance measures, thus allowing CLECs a fair opportunity to compete.

3. Tier 3: Assess Material Fines for Chronic Nonperformance

In instances where UNE price reductions and suspension of 271 authority fail to result in BOC compliance with section 271 obligations and commitments, ALTS recommends that the Commission assess material fines on BOCs. Fines should take effect within 60 days of the suspension of section 271 authority if the BOCs fail to come into compliance. ALTS submits that in order to have any component of deterrence, fines must be material. Failure to impose material fines would cause BOCs to view this penalties as a cost of doing business, rather than a means of ensuring compliance. Thus, the Commission should assess fines on a per-occurrence basis. Such fines could either be used to make individual competitors whole, or paid into a public general fund. In any event, these fines would be used as a means of requiring BOCs to satisfy their statutory obligations. Nonetheless, fines for chronic nonperformance would in no way prevent a CLEC from negotiating, arbitrating, or enforcing a liquidated damages provision in an interconnection agreement, or from pursuing other available remedies – nor would such a remedy prevent State commissions from using other tools to ensure compliance.

E. The Commission Should Provide "Freshlook" Opportunities For Consumers Immediately Upon The Grant Of 271 Authority To Bell Atlantic

Bell Atlantic states in its Application that it will impose termination penalties on customers, and contends that such penalties are in fact, procompetitive.[245] As ALTS has

[245] Application, at 45-46.

indicated in previously filed comments,[246] the Commission should exercise its authority to address the anticompetitive effects of contract termination penalties and allow fresh look opportunities upon the grant of any section 271 application. Further, as discussed above, the anticompetitive behavior in which Bell Atlantic has engaged by refusing to allow the assignment of resale contracts further warrants a fresh look period.

Clearly, the Commission possesses the legal authority to declare invalid contractual termination penalties as well as to require their removal from existing state tariffs. Congress's primary purpose in passing the 1996 amendments to the Act was to open all telecommunications markets, and particularly, local markets, to robust competition. Indeed, the Commission has consistently stated that the Act directs the Commission to open local exchange and exchange access markets to competitive entry and promote increased competition in telecommunications markets already open to competitions, such as long distance.[247] To achieve these goals, "[t]he Act directs [the Commission] and ... state [commissions] to remove no only statutory and regulatory impediments to competition, but economic and operation impediments as well."[248] Moreover, in the past the Commission has utilized "fresh look" policies to allow customers to reexamine existing telecommunications service contracts under circumstances where circumstances have dramatically changed, as when a monopoly

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246 *See* Joint Comments of the Association for Local Telecommunications Services, Net2000 Communications, Inc., and Teligent, Inc., filed on June 3, 1999 in CC Docket No. 99-142 (the "Declaratory Ruling on Excessive Termination Penalties"); *see also* KMC Telecom, Inc., Petition for Declaratory Ruling, filed on April 26, 1999, in CC Docket No. 99-142 .

247 *See, e.g., Implementation of the Local Telecommunications Provisions in the 1996 Act,* CC Docket No. 96-98, *First Report and Order,* 11 FCC Rcd 15499, ¶ 3 (1996) (*"Local Competition First Report and Order"*).

248 *Id.*

marketplace opens to competition, or where a regulatory area is subject to significantly altered circumstances.[249] ALTS submits that the Commission should exercise its authority to implement the Act and prevent long term contracts with excessive termination penalties from foreclosing the development of competition in the New York local exchange market. Under changed circumstances, such as would exist if the Commission were to grant Bell Atlantic's Application, imposing a fresh look period on contracts would allow customers to reap the benefits of local competition.[250]

The Commission should grant customers with existing long term contractual termination penalties the ability to opt out of those provisions provided that the contracts were executed prior to the grant of interLATA authority for Bell Atlantic. Such a fresh look will provide consumers with a real opportunity to assess all available choices for local exchange service and make decisions based on legitimate economics bases: business needs, pricing, features and service.

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249 *See Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 13 FCC Rcd 3659, ¶¶ 202, 264-5 (1997); *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-7465 (1992), recon., 8 FCC Rcd 7341, 7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 [75 RR 2d 487] (1994); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with Interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" requirements imposed in context of air-ground radiotelephone service as condition of grant of Title III license).

250 *See* Joint Comments of the Association for Local Telecommunications Services, Net2000 Communications, Inc., and Teligent, Inc., filed on June 3, 1999 in CC Docket No. 99-142 (the "Declaratory Ruling on Excessive Termination Penalties"); *see also* KMC Telecom, Inc., Petition for Declaratory Ruling, filed on April 26, 1999, in CC Docket No. 99-142 .

XI. CONCLUSION

For the foregoing reasons, ALTS urges the Commission to deny Bell Atlantic's instant Application and implement the procompetitive antibacksliding measures advocated herein that will promote the 1996 Act's goal of widespread facilities-based competition.

Respectfully submitted,

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